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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**

8 **ANTHONY ST. CLAIR SEALY,**)
9) CIV 08-02287 PHX FJM (MEA)
10 **Petitioner,**)
11 **v.**)
12 **CHARLES RYAN and**)
13 **ARIZONA ATTORNEY GENERAL,**)
14 **Respondents.**)
15

16 **TO THE HONORABLE FREDERICK J. MARTONE:**

17 Petitioner filed a *pro se* petition seeking a writ of
18 habeas corpus pursuant to 42 U.S.C. § 2254 on December 15, 2008.
19 Respondents¹ filed an Answer to Petition for Writ of Habeas
20 Corpus ("Answer") (Docket No. 8) on March 6, 2009. Respondents
21 argue the action for habeas relief was not timely filed and,
22 therefore, that the petition must be denied and dismissed with
23 prejudice. Petitioner filed a reply (Docket No. 9) to the
24 answer on March 31, 2009.

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¹ As the interim Director of the Arizona Department of
28 Corrections, Mr. Ryan is substituted for Dora Schriro as a respondent
 in this matter.

1 **I Procedural History**

2 A grand jury indictment filed September 1, 2000,
3 charged Petitioner with 16 counts comprised of attempted sexual
4 conduct with a minor, sexual conduct with a minor, public sexual
5 indecency, sexual abuse, molestation of a child, and attempted
6 molestation of a child. See Answer, Exh. A. The alleged crimes
7 involved three different female victims under the age of fifteen
8 and crimes occurring on separate occasions. Id., Exh. A. A
9 pre-sentence report prepared August 14, 2001, indicates
10 Petitioner confessed to the charged crimes to the police officer
11 investigating the charges and to the Probation Officer preparing
12 the report. Id., Exh. B.

13 On June 11, 2001, Petitioner signed a written plea
14 agreement by which he pled guilty to one count of sexual conduct
15 with a minor under the age of 15, a class 2 felony (Count 9 of
16 the indictment) and two counts of attempted sexual conduct with
17 a minor under the age of 15, classified as class 3 felonies
18 (Counts 1 and 4 of the indictment). Id., Exh. C & Exh. D. The
19 plea agreement provided the remaining charges against Petitioner
20 would be dismissed.

21 The written plea agreement noted the presumptive
22 sentence of 20 years imprisonment for the crime of sexual
23 conduct with a minor and a maximum term of 27 years imprisonment
24 for this crime. Id., Exh. C. The plea agreement also noted the
25 presumptive sentence of 10 years imprisonment and a maximum
26 sentence of 15 years imprisonment regarding the charges of
27 attempted sexual conduct with a minor. Id., Exh. C. The plea

1 agreement stated: "Defendant will be sentenced to prison on
2 Count 9 and to lifetime probation on Count 1. There are no
3 agreements regarding sentencing as to Count 4." Id., Exh. C.
4 Petitioner's guilty pleas were entered by the Court on July 6,
5 2001. Id., Exh. D.

6 On October 29, 2001, Petitioner was sentenced to a term
7 of 25 years imprisonment pursuant to his conviction on the
8 charge of sexual conduct with a minor. Id., Exh. E. Petitioner
9 was sentenced to a term of lifetime probation pursuant to his
10 conviction on each of the charges of attempted sexual conduct
11 with a minor under the age of 15. Id., Exh. E.

12 Petitioner initiated an action for state post-
13 conviction relief pursuant to Rule 32, Arizona Rules of Criminal
14 Procedure, on November 9, 2001. Id., Exh. F. Petitioner was
15 appointed counsel in his Rule 32 action, who informed the state
16 court on May 31, 2002, that counsel could find no meritorious
17 issues to raise on Petitioner's behalf. Id., Exh. G.

18 Petitioner filed a *pro per* petition for state post-
19 conviction relief on August 22, 2002, asking the state trial
20 court to "reconsider[]" his sentences and asserting his trial
21 defense counsel was ineffective. Id., Exh. H. Petitioner
22 asserted that, although there was no physical evidence against
23 him, his trial defense counsel "coerced" him to accept a guilty
24 plea. Id., Exh. H. Petitioner stated he had committed a crime
25 and that he had changed since his incarceration. Id., Exh. H.
26 Petitioner stated that, although he felt he "deserved a
27 punishment for failing to uphold the standards in society" he

1 was "requesting that a more lenient punishment be considered..."
2 Id., Exh. H.

3 On December 23, 2002, the Maricopa County Superior
4 Court summarily dismissed Petitioner's Rule 32 action, citing
5 Rule 32.6(c), Arizona Rules of Criminal Procedure² and concluding
6 his petition failed "to identify issues of law or fact that
7 would justify an evidentiary hearing." *Id.*, Exh. J. Petitioner
8 did not seek review of this decision by the Arizona Court of
9 Appeals or the Arizona Supreme Court. See *id.*, Exh. L.

Petitioner filed a second action seeking state post-conviction relief on October 10, 2007. *Id.*, Exh. K. Petitioner alleged he did not understand the plea agreement as explained to him by his trial counsel. *Id.*, Exh. K. Petitioner asserted that his right to due process required that what he believed to be an ambiguous plea agreement be construed in accordance with

² Subsection (c) provides:

The court shall review the petition within twenty days after the defendant's reply was due. On reviewing the petition, response, reply, files and records, and disregarding defects of form, the court shall identify all claims that are procedurally precluded under this rule. If the court, after identifying all precluded claims, determines that no remaining claim presents a material issue of fact or law which would entitle the defendant to relief under this rule and that no purpose would be served by any further proceedings, the court shall order the petition dismissed. If the court does not dismiss the petition, the court shall set a hearing within thirty days on those claims that present a material issue of fact or law. If a hearing is ordered, the state shall notify the victims, upon the victims' request pursuant to statute or court rule relating to victims' rights, of the time and place of the hearing.

1 his understanding of the agreement, citing United States v.
2 Palladino, 347 F.3d 29 (2d Cir. 2003). Id., Exh. K. Petitioner
3 also argued that his sentences violated the United States
4 Supreme Court's decision in Blakely v. Washington because the
5 sentencing court "enhance[d]" his sentences "without a jury."
6 Id., Exh. K.

7 The state trial court dismissed the Rule 32 action in
8 a decision issued October 30, 2007, noting Petitioner's
9 conviction became final in December of 2002. Id., Exh. L. The
10 state court noted that the 2007 Rule 32 action was not timely
11 filed and that Blakely could not be applied retroactively to
12 Petitioner's conviction. Id., Exh. L. The trial court further
13 stated that Petitioner had not demonstrated how Palladino, a
14 case involving the Federal Sentencing Guidelines, would apply to
15 his case or alter his sentence. Id., Exh. L. Petitioner sought
16 review of this decision by the Arizona Court of Appeals, which
17 summarily denied review on October 21, 2008. Id., Exh. N.

18 In this federal habeas action Petitioner asserts his
19 right to access the courts was violated by the state prison
20 system's inadequate legal facilities. Petitioner also contends
21 his right to due process of law was violated by his sentences.
22 Petitioner also asserts his right to be free of double jeopardy
23 was violated by an indictment which was comprised of multiple
24 charges for a "single offense." Petitioner further maintains he
25 was denied his right to the effective assistance of counsel, his
26 right to a jury trial, and his right to confront his accusers.
27 Additionally, Petitioner avers that his right to due process and
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1 equal protection were violated by the imposition of a sentence
2 of lifetime probation and also contends his sentences violate
3 his right to equal protection because he is a first-time,
4 indigent offender. With regard to the timeliness of this
5 action, in his habeas petition Petitioner asserts he was unaware
6 of the state of limitations governing habeas petitions found in
7 the Antiterrorism and Effective Death Penalty Act ("AEDPA").

8 **II. Analysis**

9 **A. The petition is barred by the statute of limitations**

10 The petition seeking a writ of habeas corpus is barred
11 by the applicable statute of limitations found in the
12 Antiterrorism and Effective Death Penalty Act ("AEDPA"). The
13 AEDPA imposed a one-year statute of limitations on state
14 prisoners seeking federal habeas relief from their state
15 convictions. See, e.g., Lott v. Mueller, 304 F.3d 918, 920 (9th
16 Cir. 2002). The AEDPA provides that a petitioner is entitled to
17 tolling of the statute of limitations during the pendency of a
18 "properly filed application for state post-conviction or other
19 collateral review with respect to the pertinent judgment or
20 claim." 28 U.S.C. § 2244(d)(2)(2006 & Supp. 2008). See also
21 Artuz v. Bennet, 531 U.S. 4, 8, 121 S. Ct. 361, 363-64 (2000);
22 Harris v. Carter, 515 F.3d 1051, 1053 (9th Cir. 2008).

23 Because Petitioner pled guilty and thereby waived his
24 right to a direct appeal, Petitioner's convictions and sentences
25 became final at the conclusion of his first action for state
26 post-conviction relief pursuant to Rule 32, Arizona Rules of
27 Criminal Procedure. See Summers v. Schriro, 481 F.3d 710, 711
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1 (9th Cir. 2007) (holding that, in Arizona, the statute of
2 limitations began to run upon "the conclusion of the Rule 32
3 of-right proceeding and review of that proceeding, or [upon] the
4 expiration of the time for seeking such proceeding or review.").
5 The state trial court denied relief in Petitioner's first Rule
6 32 action on December 23, 2002. Accordingly, the AEDPA's
7 statute of limitations began to run on or about January 23,
8 2003, when the time expired to seek review of the Maricopa
9 County Superior Court's decision denying relief by the Arizona
10 Court of Appeals. Petitioner had one year from that date, i.e.,
11 until January 23, 2004, to seek federal habeas relief.
12 Petitioner did not file a habeas petition on or before January
13 23, 2004.

14 Petitioner's second action seeking state post-
15 conviction relief was filed on October 10, 2007, after the
16 federal habeas statute of limitations expired. That state Rule
17 32 action could not and did not restart the already-expired
18 statute of limitations for filing Petitioner's federal habeas
19 action. See Ferguson v. Palmateer, 321 F.3d 820, 823 (9th Cir.
20 2003), citing Tinker v. Moore, 255 F.3d 1331, 1333 (11th Cir.
21 2001); Preston v. Gibson, 234 F.3d 1118, 1120 (10th Cir. 2000).
22 A state-court petition that is filed after the expiration of the
23 statute of limitations under the AEDPA does not revive the
24 running of the limitations period. See Jiminez v. Rice, 276
25 F.3d 478, 482 (9th Cir. 2001); Fisher v. Gibson, 262 F.3d 1135,
26 1142-43 (10th Cir. 2001); Payton v. Brigano, 256 F.3d 405, 408
27 (6th Cir. 2001).

1 **B. Equitable tolling of the statute of limitations**

2 Petitioner is not entitled to the equitable tolling of
3 the statute of limitations. A petitioner seeking equitable
4 tolling must establish two elements: "(1) that he has been
5 pursuing his rights diligently, and (2) that some extraordinary
6 circumstance stood in his way." Pace v. DiGuglielmo, 544 U.S.
7 408, 418, 125 S. Ct. 1807, 1814-15 (2005).

8 The Ninth Circuit Court of Appeals has determined
9 equitable tolling of the filing deadline for a federal habeas
10 petition is available only if extraordinary circumstances beyond
11 the petitioner's control make it impossible to file a petition
12 on time. See Harris v. Carter, 515 F.3d 1051, 1054-55 & n.4
13 (9th Cir.), cert. denied, 129 S. Ct. 397 (2008); Gaston v.
14 Palmer, 417 F.3d 1030, 1034 (9th Cir. 2003), modified on other
15 grounds by 447 F.3d 1165 (9th Cir. 2006). Equitable tolling is
16 only appropriate when external forces, rather than a
17 petitioner's lack of diligence, account for the failure to file
18 a timely claim. See Miles v. Prunty, 187 F.3d 1104, 1107 (9th
19 Cir. 1999).

20 Equitable tolling is to be rarely granted. See Jones
21 v. Hulick, 449 F.3d 784, 789 (7th Cir. 2006); Stead v. Head, 219
22 F.2d 1298, 1300 (11th Cir. 2000) (holding this remedy is
23 "typically applied sparingly"). The petitioner must establish
24 a causal connection between the alleged roadblock to their
25 timely filing of their federal habeas petition and the actual
26 failure to file the petition on time. See Gaston, 417 F.3d at
27 1034; Lawrence v. Florida, 421 F.3d 1221, 1226-27 (11th Cir.

1 2005). It is Petitioner's burden to establish that equitable
2 tolling is warranted in his case. Gaston, 417 F.3d at 1034.

3 A petitioner's *pro se* status, ignorance of the law, and
4 lack of representation during the applicable filing period do
5 not constitute extraordinary circumstances justifying equitable
6 tolling because such circumstances are not "extraordinary."
7 See, e.g., Rasberry v. Garcia, 448 F.3d 1150, 1154 (9th Cir.
8 2006); Shoemate v. Norris, 390 F.3d 595, 598 (8th Cir. 2004).
9 Additionally, a federal habeas petitioner seeking equitable
10 tolling must also act with "reasonable" diligence "throughout
11 the period he seeks to toll." Warren v. Garvin, 219 F.3d 111,
12 113 (2d Cir. 2000). See also Roy v. Lampert, 465 F.3d 964, 969
13 (9th Cir. 2006); Jones v. Morton, 195 F.3d 153, 159 (3d Cir.
14 1999).

15 In his reply to the answer to his petition, Petitioner
16 contends the state court's dismissal of his first Rule 32 action
17 denied him his right to access the courts. Petitioner asserts
18 his appointed post-conviction counsel was ineffective because he
19 did not inform Petitioner of the AEDPA's time limitations. With
20 regard to the "untimeliness of his petition," Petitioner asserts
21 "he did not know the existence of the AEDPA," and that the State
22 of Arizona failed to provide "notice" of its statute of
23 limitations. Petitioner contends the failure to provide notice
24 voids any argument that he knowingly, intelligently, and
25 voluntarily "waive[d] such rights concerning the provisions of
26 the AEDPA ..." Docket No. 9 at 11. Petitioner contends the
27 state may not assert the statute of limitations as a defense to
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1 his habeas claims because the state did not give him "notice" of
2 the statute of limitations. Id. at 12. Petitioner asserts that
3 imposing the statute of limitations when he had no notice of
4 such has violated his right to due process because he has been
5 deprived of a protected liberty interest without notice. Id.
6 Petitioner argues he has a constitutional right to file a habeas
7 petition which has been denied by the State of Arizona.
8 Additionally, Petitioner maintains he has not procedurally
9 defaulted all of his federal habeas claims in the state courts.

10 Petitioner has not met his burden of establishing that
11 there were extraordinary circumstances beyond his control which
12 made it impossible for him to file a timely federal habeas
13 petition, or that any state action was the "but for" cause for
14 his failure to timely file his federal habeas action. See Brown
15 v. Barrow, 512 F.3d 1304, 1306-07 (11th Cir. 2008) (holding the
16 petitioner has a strong burden to plead specific facts
17 supporting their claim of extraordinary circumstances). See
18 also Pace, 544 U.S. at 418-19, 125 S. Ct. at 1815 (concluding
19 that the petitioner was not entitled to equitable tolling
20 because he was not misled or confused about the exhaustion of
21 his state remedies and filing his federal habeas petition).
22 Petitioner has not met his burden of establishing that there
23 were extraordinary circumstances beyond his control which made
24 it impossible for him to file a timely federal habeas petition.
25 Compare Sanchez v. Cambra, 137 Fed. App. 989, 990 (9th Cir.
26 2005). Additionally, Petitioner did not act with reasonable
27 diligence throughout the time period he seeks to toll. See

1 Miller v. Marr, 141 F.3d 976, 978 (10th Cir. 1998) (rejecting a
2 claim to equitable tolling where the petitioner "provided no
3 specificity regarding the alleged lack of access and the steps
4 he took to diligently pursue his federal claims"). Compare Roy,
5 465 F.3d at 969-72.

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7 **IT IS THEREFORE RECOMMENDED** that Mr. Sealy's Petition
8 for Writ of Habeas Corpus be **denied and dismissed with
9 prejudice.**

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11 This recommendation is not an order that is immediately
12 appealable to the Ninth Circuit Court of Appeals. Any notice of
13 appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate
14 Procedure, should not be filed until entry of the district
15 court's judgment.

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17 Pursuant to Rule 72(b), Federal Rules of Civil
18 Procedure, the parties shall have ten (10) days from the date of
19 service of a copy of this recommendation within which to file
20 specific written objections with the Court. Thereafter, the
21 parties have ten (10) days within which to file a response to
22 the objections. Pursuant to Rule 7.2, Local Rules of Civil
23 Procedure for the United States District Court for the District
24 of Arizona, objections to the Report and Recommendation may not
25 exceed seventeen (17) pages in length.

26 Failure to timely file objections to any factual or
27 legal determinations of the Magistrate Judge will be considered
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1 a waiver of a party's right to de novo appellate consideration
2 of the issues. See United States v. Reyna-Tapia, 328 F.3d 1114,
3 1121 (9th Cir. 2003) (en banc). Failure to timely file
4 objections to any factual or legal determinations of the
5 Magistrate Judge will constitute a waiver of a party's right to
6 appellate review of the findings of fact and conclusions of law
7 in an order or judgment entered pursuant to the recommendation
8 of the Magistrate Judge.

9 DATED this 7th day of April, 2009.

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13 Mark E. Asper
United States Magistrate Judge